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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 770

JAY H. TAYLOR,

Appellant,

vs.

THE KENTUCKY STATE BAR ASSOCIATION

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF KENTUCKY

APPELLANT'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS

JAY H. TAYLOR,
Pro se.

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KENTUCKY STATE BAR ASSOCIATION,

Appellee

RESPONSE STATEMENT OF APPELLANT TO APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS APPEAL.

MAY IT PLEASE THE COURT:

The appellee, in its statement opposing jurisdiction and motion to dismiss appeal herein, asserts the lack of jurisdiction on the ground that appellant failed to bring into issue the validity of Section 30.170 of the Kentucky Revised Statutes as being repugnant and in conflict with the Federal Constitution, claiming and asserting that said issue was never raised in the Kentucky Court of Appeals by the appellant in the pleadings or otherwise in the original proceeding.

Appellant, in response to appellee's said statement opposing jurisdiction, says:

Appellant, in his petition for a rehearing, set forth two grounds upon which he asked the Kentucky Court of Appeals to reconsider its findings; he asked the Kentucky Court of Appeals to reconsider the constitutionality of Section 30.100 as being repugnant and in conflict with both the State and Federal Constitutions. This section, if held constitutional, put a final and permanent end to appellant's rights to practice law in the State of Kentucky.

Appellant did for the first time attack the constitutionality of Section 30.170 of the Kentucky Revised Statutes in his Petition for a Rehearing. It was the contention of the appellant that Section 30.170 is unconstitutional and is violative of the due process clause of the United States Constitution, which is set forth in the Fourteenth Amendment to the United States Constitution, and that the procedure which was followed by the Kentucky Court of Appeals under said section of said statute, in reaching its opinion in this case, was void. If the said section of the statutes is unconstitutional, then the procedure had under said section of said statute and the judgment predicated thereon would necessarily be void.

It is now the contention of appellant in this response that the question of the validity of a state statute may be brought into question in a petition for a rehearing, although said question of the validity of said statute was not in issue in the original proceedings. Because if the statute is void, any and all procedure had under said statute is also void *ab initio*.

Section 30.170 provides that all laws or parts of laws in conflict herewith are hereby repealed to the extent of said conflict, and that the said rules and regulations promulgated by the Kentucky Court of Appeals shall supersede

all laws and parts of laws in conflict herewith. It is the position of the appellant that Section 30.170, which undertakes to, and does vest the Kentucky Court of Appeals with the authority to make rules and regulations which supersede a statute, is certainly void, and that said appellant may attack the validity and bring in issue the constitutionality of said statute in his petition for a rehearing.

Ground One upon which appellant asked the Court for a rehearing in his petition therefor, was squarely before the Court in the original proceedings as well as in the Petition for a Rehearing; notwithstanding, the said Court of Appeals failed and refused to pass upon or to decide whether Section 30.100 was or was not constitutional, which placed the appellant in a "piggly wiggly" situation, or like a mariner at sea without a compass and therefore unable to find his way through the stormy waves of the sea.

The appellee cites the opinion of the Kentucky Court of Appeals in the *Hazel Green Oil and Gas Company* against *Collier*, reported in 130 Kentucky, page 132, 112 S. W., page 1090, as being in point on the question that appellant could not raise the validity or the constitutionality of a statute which was not brought into question in the original proceedings, but which was raised for the first time in a Petition for a Rehearing. Appellant has carefully read the opinion in that case, and the petition for a rehearing in that case did not attack or undertake to bring in issue the validity of a state statute, but undertook to and did set up an independent action unrelated to the original action. The original action in that case sought to enforce or cancel a lease contract. In the petition for a rehearing in that case, the appellee sought the right to remove certain properties and fixtures which it had placed on the land covered by the lease contract, which had no relation to or with the original proceedings, and to obtain this relief it would have been neces-

sary for the appellee to institute a new and independent action. Therefore, said opinion in that case could not be in point or controlling in this case.

However, the Kentucky Court of Appeals held in the case of *Gaffney* v. *Switow*, 211 Ky. 232, 277 S. W. 453, that

> "• • • A case is considered by the court, which determines whether the judgment shall be affirmed or reversed and also determines what shall be written in the opinion. Opinion is then prepared by the Judge or the Commissioner having the record, and is then read to the court, and, if need be, corrected by it. It is then handed down. It is the opinion of the court and is often not written as a writer would have written if it were his personal opinion. If the facts of the case are fairly stated in the opinion, the conclusion of law may be accepted as the conclusion of the court on the law of the case. The writer of the opinion is responsible for the statement of the facts but the court alone is responsible for the conclusion of law drawn from those facts.
>
> "When a petition for a rehearing is filed in a case written by one of the Commissioners, the record is sent to one of the Judges. If a petition is filed in a case written by one of the Judges, the record is sent to a Judge other than the writer of the opinion. In either case, the Judge to whom the record is sent examines the case and reports to the court the questions of law and fact. The case is then reconsidered by the court, and such disposition made as the court determines."

The Kentucky Court of Appeals under Subsection 2 of Rule 9 considers all questions presented to it in a petition for a rehearing as stated in the above case.

A statute which is in violation of, and in conflict with, and is repugnant to the State or Federal Constitution cannot be binding against the rights of the citizens of the United States; and a statute which violates and infringes upon the rights of the citizens of the United States and in violation

of the Federal Constitution, certainly can be brought into question in the State Court in a petition for a rehearing.

WHEREFORE, appellant respectfully submits this, his response to appellee's statement opposing jurisdiction, and moves the Court that same be filed and considered by the Court.

JAY H. TAYLOR,
Attorney for Appellant.